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Survey: Woman and California Law

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SURVEY: WOMEN AND CALIFORNIA LAW

This survey of California, a regular feature of the Women's Law Forum, summarizes recent California Supreme Court and Court of Appeal decisions of special importance to women. A brief analysis of the issues pertinent to women raised in each case is provided.

TABLE OF CONTENTS

I. CRIMINAL LAW

A. SEX OFFENSES

1. *Perpetrator may be convicted of multiple, identical, consecutive sexual offenses if, according to the statutory definition of the applicable crime, the previous offense has ended before the next offense is begun.*

In *People v. Harrison*, 196 Cal. App. 3d 828, 242 Cal. Rptr. 223 (1987), the California Court of Appeals, Fourth Appellate District, upheld the conviction of a perpetrator of multiple, identical sexual offenses, committed consecutively. The court used the statutory definition of the applicable crime to determine whether the previous offense had ended before the next offense had begun.

Defendant Harrison entered the apartment of V.N., the victim, early one morning in June of 1985. After hitting her in the face as she lay in her bed, Harrison reached into V.N.'s underwear and put his finger in her vagina. V.N. found herself half-standing next to the bed and continued to struggle until Harrison's finger came out. Harrison pushed V.N. onto the bed, put his hand over her mouth to muffle her screams, and put his finger in her vagina a second time. V.N. pried his hand off her mouth and Harrison hit her again in the face. V.N. freed herself and attempted to get to the door. As she began to run, Harrison grabbed her hair, began to punch her, and inserted his finger into her vagina. V.N. continued to struggle and told Harrison that she would "do it" if he stopped. V.N. entered the bathroom, locked the door, opened up the window and began to scream "rape".

The first penetration lasted approximately four seconds, the second and third penetrations approximately five seconds each. The attack lasted seven to ten minutes. Harrison was convicted by a jury of three counts of forcible genital penetration with a foreign object[1] and sentenced to eight years for one count, and two years for each of the others.

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1. CAL. PENAL CODE § 289 (Deering's 1985 & Supp. 1988) punishes the forcible penetration of the vagina or anus of another with a foreign object.

Harrison appealed the judgment, contending that the evidence supported only one count of forcible penetration, and that a conviction of three counts of forcible penetration violated California Penal Code Section 654.[2]

In concluding that Harrison's attack was indeed comprised of three separable offenses, the appellate court discussed three recent cases in which a similar issue had been raised.

In *People v. Perez*,[3] a trial court had held that section 654 precluded conviction for acts of sodomy, rape, and oral copulation against a single victim within a forty-five minute time span, as all three offenses were committed with the common intent and objective of sexual gratification. The Supreme Court reversed. It stated that although there was a general common intent, precluding punishment for separate offenses would "violate the statute's purpose to insure that a defendant's punishment will be commensurate with his culpability."[4] The court held as long as none of the offenses were committed as a means of committing any other, section 654 did not preclude punishment for each separate offense.

The *Harrison* court then discussed *People v. Marks*.[5] In this case an appellate court upheld defendant's conviction on two counts of sodomy. Defendant had moved the victim, repositioned her, and covered her head between the two acts. The court stated that "[d]efendant, who caused his victim to undergo two separate humiliating and painful violations of her body, was more culpable in committing the two acts of sodomy than if he had committed only one."[6]

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2. CAL. PENAL CODE § 654 (Deering's 1983) provides that "[a]n act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one. . . ."

3. People v. Harrison, 196 Cal. App. 3d 828, 832, 242 Cal. Rptr. 223, 225 (1987), citing People v. Perez, 23 Cal. 3d. 545, 591 P.2d 63, 153 Cal. Rptr. 40 (1979).

4. *Id.* at 832, 242 Cal. Rptr. at 225, citing *Perez*, 23 Cal. 3d at 552, 591 P.2d at 68, 153 Cal. Rptr. at 44.

5. *Id.* at 833, 242 Cal. Rptr. at 226, citing People v. Marks, 184 Cal. App. 3d 458, 229 Cal. Rptr. 107 (1986).

6. *Id.* at 833, 242 Cal. Rptr. at 226, citing *Marks*, 184 Cal. App. 3d at 467, 229 Cal. Rptr. at 112.

The court also relied on *People v. Hammon*,[7] where an appellate court delineated the criteria for identifying when multiple sexual offenses can be found. That court held that a series of varied sexual acts, a rape followed by sodomy constituted separate offenses. However, if the series of sexual acts were identical, the perpetrator must have had a reasonable opportunity for reflection between the acts, if multiple offenses were to be found.[8]

The *Harrison* court rejected the *Hammon* test for two reasons. First, the court viewed the addition of a requirement that the perpetrator must have had a reasonable opportunity to reflect as "judicial legislation". When drafting the applicable criminal statute, the legislature failed to include any requirement of reflection. Therefore, reliance on any such judicially-created requirement to determine when a sexual offense is initiated would be in defiance of legislative intent.

Second, the court found the *Hammon* court's distinction between consecutive, varied sexual offenses and consecutive, identical offenses illogical. The court stated that the application of the *Hammon* test would mean that a perpetrator who raped and then sodomized his victim could be convicted of both acts, while a perpetrator who raped, and then raped his victim again would be required to have had a "reasonable opportunity for reflection" between acts. This distinction would have the effect of rewarding the "unimaginative" sexual offender by making it more difficult to convict him for both offenses.

In the instant case, the court held that in order to determine whether one offense has ended and another has begun, "[t]he touchstone must be the legislature's definition of the offense."[9] The statute under which Daryl Harrison was convicted, Section 289(a) of the Penal Code, the statute under which Daryl Harrison was convicted, punishes "[the] penetration, however slight, of the genital or anal openings of another person . . .".[10] The court then reasoned that the offense ended when the for-

7. *Id.* 834, 242 Cal. Rptr. at 226, citing People v. Hammon, 191 Cal. App. 3d. 1084, 236 Cal. Rptr. 822 (1987).

8. *Id.* at 834, 242 Cal. Rptr. at 227, citing *Hammon*, 191 Cal. App. 3d at 1099, 236 Cal. Rptr. at 822.

9. *Id.* at 836, 242 Cal. Rptr. at 228.

10. CAL. PENAL CODE § 289(a) (Deering's 1985 & Supp. 1988).

eign object, Harrison's finger, was withdrawn. V.N. forced Harrison to withdraw twice, each time terminating the offense. Therefore, it was within the trial court's discretion, therefore, to sentence Harrison for three counts of vaginal penetration.

The majority correctly recognized that "[t]he factual variety of human misconduct precludes our articulating any particular criteria."[11] By dictating that all the circumstances will be examined, and that the statutory definition will be used to determine whether an attack has ended, the court set forth a test which is workable, and which unlike the *Hammon* test, adheres to legislative intent.

*Amy C. Hirschkron**

2. *Accused child molesters are entitled to discovery of the victim's psychiatric history.*

People v. Caplan, 193 Cal. App. 3d 543, 238 Cal. Rptr. 478 (4th Dist. 1987). In *People v. Caplan*, the California Court of Appeal ruled that the trial court erred when it refused to allow (as privileged) discovery of and introduction into evidence of the victim's psychiatric history; thereby depriving the defendant of his constitutional rights of due process, confrontation and cross-examination. This case involved criminal sexual abuse against a then four year old girl.

However, the court also ruled that there was sufficient evidence to support the defendant's conviction for committing two counts of lewd and lascivious acts upon a minor; or alternatively, having a minor child orally copulate him on two separate occasions.[1]

The expert testimony that was erroneously excluded con-

11. *Harrison*, 196 Cal. App. 3d at 837, 242 Cal. Rptr. at 229.

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1. CAL. PENAL CODE § 288A (A) (West Supp. 1988) or alternatively CAL. PENAL CODE § 288A (C) (West Supp. 1988).

cerned physical evidence of sexual abuse and did not apply to the oral copulation counts. In addition, there was corroborating testimony to support the child's unwavering accounts of the oral copulation incidences.

The victim (Cindy) was almost four years old when she went to live in the home of her foster parents, Daniel and Debbie Caplan.[2] A little over a year later Mrs. Caplan became suspicious that Cindy was being molested by Caplan[3] and mentioned her fears to her nurse practitioner, who filed a report of suspected child abuse.

Cindy was taken for a physical examination at the Children's Hospital where a doctor assessed the child's physical symptoms: vaginal and anal redness, swelling and tenderness. The doctor attributed the symptoms to poor hygiene techniques and a possible case of pinworms. Still, Mrs. Caplan maintained her concerns and asked Cindy's social worker to place her elsewhere.[4]

In March of 1983 Cindy and her sister were taken from the Caplan home and placed for adoption in another home. In January, 1984, several months after the adoption process became final, Cindy revealed to her adoptive mother the "bad things" that Caplan had done to her while she lived in the Caplan home.[5]

In May 1984 Caplan's acts were reported to the police. Cindy was interviewed twice by Sheriff's deputies, once with the use of anatomically correct dolls. Both officers believed the child

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2. *Caplan*, 193 Cal. App. 3d 546, 238 Cal. Rptr. 479. This was the second foster home in which Cindy and her sister had been placed after being taken from her natural parents. The children were removed from the first foster home nine months after their arrival due to Cindy's inability to adjust to it. *Id.* at 547, 238 Cal. Rptr. at 480.

3. Caplan spent too much "lap time" with Cindy in addition to giving her "long embraces and kisses". On one occasion Mrs. Caplan awakened at night and saw him coming out of Cindy's bedroom, and on another she got up at 6 a.m. to find Caplan and Cindy alone in the hallway with Caplan rubbing Cindy's back. According to Cindy this episode was one occasion on which Caplan had her orally copulate him. *Id.* at 548, 238 Cal. Rptr. at 481.

4. *Id.* at 549, 238 Cal. Rptr. at 481-82.

5. Cindy had been afraid to mention these incidences before because she was afraid that her new parents would think she was bad, reject her and refuse to adopt her. *Id.* at 546, 238 Cal. Rptr. at 479.

was telling the truth and did not prompt her answers in any way.[6]

Cindy was also reexamined by the Children's Hospital physician who concluded that Cindy had been sexually abused.[7] After further investigation Caplan was charged with committing six criminal sexual acts against Cindy.[8]

At trial[9] Cindy contradicted some of her statements to her adoptive mother and the Sheriff's deputies about whether Caplan had digitally penetrated her after the initial physical examination. The child was, however, unequivocal and consistant in her testimony that on two separate occasions Caplan had her orally copulate him.[10]

Caplan testified in his own behalf, followed by several defense witnesses.[11] A recess in the trial was taken for another physical exam in which Cindy's vaginal area was photographed.

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6. *Id.* at 547, 238 Cal. Rptr. at 480.

7. The pediatrician reversed her previous negative diagnosis, "stating Cindy's previous quick responses of no's to any abuse questions were not unusual since she was still in the Caplan home." *Id.* at 547, 238 Cal. Rptr. at 480.

8. Caplan was charged with committing six criminal acts on Cindy and two acts on another girl. The counts were severed on pretrial motion and the counts involving Cindy proceeded first. *Id.*

9. Caplan, with his attorney's consent, waived a jury trial. *Id.*

10. The two occasions were: once in the hallway (*supra* note 3) and once in a downstairs stairwell where the coats and shoes were stored. The second occurrence was interrupted by the sound of another foster child on the stairs. *Id.* at 544, 238 Cal. Rptr. at 484.

11. Caplan's witnesses included a psychiatrist who, after reviewing the material about Cindy, concluded that she was emotionally disturbed, and might misperceive, exaggerate, distort, or lie about the episodes. *Id.* at 557, n.3, 238 Cal. Rptr. at 484, n.3. An additional witness, another psychiatrist, concluded that Caplan was not a sexually disordered person. In response the trial court stated in its opinion:

> My experience. . .is a substantial background in the family law area with numerous allegations of molestation of children. I don't come to this court fresh and new without any concept of the kind of allegations and the work of psychiatrists and psychologists in the field of alleged child molest. The reason I asked. . .whether he could define a child molester and whether it wasn't true that child molesters come from every part of the community and every occupation is because that is my honest belief. . .[C]hild molesters don't look different than other people. Therefore, I don't think that they testify differently. I don't think their demeanor is of a great deal of value in terms of who is and who is not.

Id. at 553, 238 Cal. Rptr. at 484.

A detailed, enlarged print was provided for the court and further expert testimony followed.

The trial court found the expert testimony conflicting enough that he was unable to find Caplan guilty beyond a reasonable doubt on the four counts which involved penal or digital penatration. However, he did find Caplan guilty of two counts of oral copulation, or in the alternative, lewd and lascivious acts upon a minor.[12]

On appeal Caplan contended that the trial court prejudicially erred when it refused to allow discovery and introduction into evidence of Cindy's psychiatric history, in addition to averring that there was inadequate evidence to support the convictions.[13]

In refusing discovery and entry into evidence of Cindy's psychiatric history, the trial court relied on Evidence Code section 1014,[14] which provides in pertinent part: "[T]he patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing a confidential communication between patient and psychotherapist . . . ." The appellate court ruled that while the privilege is usually broadly interpreted in the patient's favor, it may be overruled in the face of compelling state interests.

In addition, Evidence Code section 1027[15] states the privilege does not exist if: "(9a) [t]he patient is a child under the age of 16 [and] (b) [t]he psychotherapist had reasonable cause to believe that the patient has been the victim of a crime and that disclosure of the communicaton is in the best interest of the child."

The appellate court ruled that "the best interests of the child" did not mean "the mere allegations of wrongdoing against a particular person. Seeking the truth of those allegations would appear to be in the best interests of the child for appropriate

12. *Id.* at 554, 238 Cal. Rptr. at 484.
13. *Id.* at 555, 238 Cal. Rptr. at 485.
14. CAL. EVID. CODE § 1014 (West 1966 & Supp. 1988).
15. CAL. EVID. CODE § 1027 (West Supp. 1988).

treatment."[16] Therefore, the court ruled that Cindy's claim of privilege must give way to Caplan's constitutional rights of due process, confrontation and cross-examination.

To determine whether the error was harmless, the court remanded the case to the trial court for it to review the evidence and determine if it would have changed the outcome, in which case a new trial would be ordered. If the evidence would not have affected the outcome the trial court was to reinstate the guilty verdicts.

*Michele M. Feher**

B. Juror Misconduct

1. *Failure of a juror to reveal she was physically abused by her husband constituted prejudicial juror misconduct in the trial of a woman accused of killing her husband in self defense.*

People v. Blackwell, 191 Cal. App. 3d 925, 236 Cal. Rptr. 803 (1st Dist. 1987). In *People v. Blackwell*, the defendant was convicted of second degree murder for killing her husband after he physically abused her. The defendant filed a motion for new trial contending that the failure of a juror to reveal her personal experiences with alcoholism and an abusive husband during voir dire constituted prejudicial juror misconduct. The trial court denied her motion and the appellate court reversed.

The defendant, Sally Ann Blackwell, was convicted of second degree murder. She filed a motion for a new trial based on the fact that a juror failed to reveal relevant personal information during voir dire. The prosecutor argued that no prejudicial misconduct had occurred, but did not contest the validity of the defendant's statement. The trial court agreed with the prosecutor and denied the motion for new trial.[1]

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16. *Caplan*, 193 Cal. App 3d 556, 238 Cal. Rptr. 486.

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1. Voir dire means literally in Latin "to speak the truth." A voir dire examination

The defendant was a victim of ongoing physical abuse by her husband. He frequently drank and became physically violent. On the day she shot her husband, he had beaten her and threatened to kill her. To prevent further abuse or her own death, the defendant shot her husband in self defense.[2]

After the trial, a juror declared that her former husband was an alcoholic who beat her. She failed to reveal this evidence when specifically asked during voir dire.[3] The juror stated in her post-conviction declaration that, in her opinion, if she was able to get out of a similar situation without resorting to violence, the defendant could have done the same. The defendant argued that she had the constitutional right to have the charges against her determined by a fair and impartial jury.[4] Under California statutes, she had the right to exercise peremptory challenges against prospective jurors whom she believed could not be fair and impartial.[5]

The defendant cited *People v. Williams*.[6] The *Williams* court characterized the peremptory challenge as "a critical safeguard of the right to a fair trial before an impartial jury."[7] For this reason, counsel may use voir dire to aid in the exercise of peremptory challenges.[8] During voir dire, prospective jurors are examined under oath; their truthful responses provide a basis for peremptory challenges.[9] The defendant argued that trial courts rely on the jury selection process to choose an unbiased jury. She asserted that this process would be meaningless if prospective jurors responded falsely or deliberately concealed facts during voir dire.[10] The defendant also argued that had the juror

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refers to the preliminary examination by the court to determine the qualifications of prospective jurors where their competency or interest can be objected to. BLACK'S LAW DICTIONARY 1412 (5th ed. 1979).

2. *Blackwell*, 191 Cal. App. 3d 925, 927-28, 236 Cal. Rptr. 803, 804 (1987).

3. *Id.* at 928, 236 Cal. Rptr. at 804.

4. U.S. CONST. AMENDS. VI, XIV, §1, CAL. CONST., art. 1 §16.

5. The peremptory challenge is a request made by a party to a judge to exclude prospective jurors for which no cause need be stated. The number of such challenges is usually prescribed by statute. BLACK'S LAW DICTIONARY 207 (5th ed. 1979). CAL. PENAL CODE §§1067-70 (West 1985 & Supp. 1988).

6. People v. Williams, 29 Cal. 3d 392, 628 P.2d 869, 174 Cal. Rptr. 312 (1981).

7. *Id.* at 405, 174 Cal. Rptr. at 323, 628 P.2d at 875.

8. *Id.*

9. *Id.*

10. *Blackwell*, 191 Cal. App. 3d at 929, 236 Cal. Rptr. at 805.

responded truthfully during voir dire and defense counsel discovered the juror's bias, she could have exercised her rights to challenge the juror.[11]

In California, a juror's intentional concealment of relevant facts or giving false responses during voir dire constitutes juror misconduct.[12] Occurrence of such misconduct raises a rebuttable presumption of prejudice.[13] Further, prejudicial jury misconduct constitutes grounds for a new trial.[14] Upon review of the record, the appellate court found that juror prejudice did exist. Therefore it held there was a reasonable probability of actual harm to the defendant.[15] On these grounds, the appellate court reversed the trial court and granted defendant's motion for new trial.[16]

*Te Jung Chang**

C. Composition of a Jury

1. *Battered women are not an identifiable group whose representation is essential to a fair jury trial.*

People v. Macioce, 197 Cal. App. 3d 262, 242 Cal. Rptr. 771 (6th Dist. 1987). In *People v. Macioce*, the California Court of Appeal determined that a prosecutor did not commit reversible error when he excluded "battered women" from a jury. The court held that "battered women" were not an identifiable group whose presence is essential to a fair jury trial, and affirmed the lower court's conviction of a woman for the murder of her husband.

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11. *Id.* (citing People v. Diaz, 152 Cal. App. 3d 926, 931-39, 200 Cal. Rptr. 77, 80-86 (1984)).

12. *Id.* (citing People v. Pierce, 24 Cal. 3d 199, 207, 155 Cal. Rptr. 657, 661, 595 P.2d 91, 95 (1979)).

13. A rebuttable presumption of prejudice is a presumption that can be overturned with sufficient proof. Black's Law Dictionary 1068 (5th ed. 1979). Cal. Penal Code §1181(3) (West 1985).

14. *Id.* (citing Cal. Penal Code §1181(3)).

15. *Id.*

16. *Id.* at 932, 236 Cal. Rptr. at 807.

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Defendant Macioce stabbed and killed her husband. During jury selection for her trial, the prosecutor exercised six peremptory challenges[1] and one challenge for cause.[2] Four of the peremptory challenges and the challenge for cause were used to exclude women. The defense counsel twice objected to the prosecutor's use of peremptory challenges to exclude women. In both instances, the prosecutor explained his reason for using the peremptory challenge to the trial court's satisfaction. The jury which decided Macioce's case consisted of eight men and four women. The jury found her guilty of murder in the second degree.

On appeal, Macioce argued, among other things, that the prosecutor erred in using his challenges to systematically exclude women, and especially "battered women" from the jury. She relied on *People v. Wheeler*.[3] In *Wheeler*, the California Supreme Court reversed the trial court's murder conviction of two black men accused of killing a white man. During jury selection, the prosecutor had used peremptory challenges to strike every black person from the jury. The California Supreme Court held that the systematic exclusion of all black people from the jury on the basis of group bias violated the defendants' rights to a fair jury trial by a "representative cross-section of the community."[4] However, the supreme court went on to say, "[T]his does not mean that members of such a group are immune from peremptory challenges . . . Nor does it mean that a party will be entitled to a petit jury that proportionately represents every group in the community."[5]

In the Macioce case, the court rejected the argument that she was denied a fair jury comprised of a representative cross-section of the community. The court refused to recognize "bat-

1. The peremptory challenge is a request made by a party to a judge to exclude prospective jurors for which no cause need be stated. The number of such challenges is usually prescribed by statute. BLACK'S LAW DICTIONARY 209 (5th ed. 1979).

2. A challenge for cause is a request made by a party to a judge that a prospective juror not be allowed to be a member of the jury for specified causes or reasons. BLACK'S LAW DICTIONARY 209 (5th ed. 1979).

3. People v. Macioce, 197 Cal. App. 3d 262, 277, 242 Cal. Rptr. 771, 781 (citing People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978)).

4. *Id.* (quoting *Wheeler*, 22 Cal. 3d at 276, 583 P.2d at 761-62, 148 Cal. Rptr. at 903).

5. *Id.* (quoting *Wheeler*, 22 Cal. 3d at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903).

tered women" as an identifiable group of persons. The court relied on *People v. Fields*[6] to help define an identifiable group of persons. The *Fields* court stated that "persons previously arrested, crime victims, believers in law and order, etc. are not identifiable groups whose representation is essential to a constitutional venire."[7] The *Macioce* court reasoned that since "battered women" were victims of crime, they were not an identifiable group under the *Fields*[8] exclusion.

Additionally, the court cited *Rubio v. Superior Court*[9] in which the California Supreme Court held that an "identifiable group" must fulfill two requirements: first, its members must share a common perspective arising from their experiences as members of the group, and second, the party seeking to prove a violation of the cross-section rule has the burden of showing other members of the community cannot adequately represent the attitudes of the group assertedly excluded.[10] The court concluded that since there was no showing that the viewpoints of battered women cannot be adequately represented by unbattered women, Macioce was not denied a jury comprised of a representative cross-section of the community.[11]

*Te Jung Chang**

II. FAMILY LAW

A. COMMUNITY PROPERTY

1. *Property and custody settlements may be vacated by the trial court if it finds that the contesting parties'*

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6. *Id.* at 278, 242 Cal. Rptr. at 781 (citing People v. Fields, 35 Cal. 3d 329, 673 P.2d 680, 197 Cal. Rptr. 803 (1983)).

7. *Id.* (quoting *Fields*, 35 Cal. 3d at 348, 673 P.2d at 691, 197 Cal. Rptr. at 814).

8. People v. Macioce, 197 Cal. App. 3d 262, 279, 242 Cal. Rptr. 771, 782.

9. *Id.* (citing Rubio v. Superior Court, 24 Cal. 3d 93, 593 P.2d 595, 154 Cal. Rptr. 734 (1979)).

10. *Id.* (citing *Rubio* 24 Cal. 3d at 98, 593 P.2d at 598, 154 Cal. Rptr. at 737).

11. *Macioce,* 197 Cal. App. 3d at 280, 242 Cal. Rptr. at 782.

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consent to the settlement was coerced.

In re Marriage of Brockman, 194 Cal. App. 3d 1035, 240 Cal. Rptr. 96 (2nd Dist. 1987). In *In re Marriage of Brockman,* the court of appeal held that property and custody settlements may be vacated by the trial court if it finds that the contesting parties' consent to the settlement was coerced.

In 1984, the plaintiff, Debra D. Brockman, filed for divorce in Pasadena.[1] The Brockmans had been married five years and had a young son. Mrs. Brockman's fourteen year old daughter also lived with the couple.

While on a visit with the children in Sacramento, where they were staying with their mother, the defendant, Donald D. Brockman, flew the children to Los Angeles and refused to return them. Some six weeks later the defendant offered to return the children to the plaintiff at an upcoming court hearing.[2]

At the hearing, defendant threatened to keep the children unless the plaintiff gave up all claims to the couple's considerable ($400,000 to $800,000) community property. Plaintiff was allowed to keep $10,000 and a Camero car. Defendant agreed to pay child and spousal support totaling $800 per month for ten years. If plaintiff agreed to the arrangement she would receive sole physical custody of the children and an agreement from the defendant that he would forfeit a $100,000 note if he ever contested the custody or support order. Defendant's attorney wrote out the agreement by hand and plaintiff signed it in the courthouse hallway.[3]

Plaintiff moved to vacate the judgment in its entirety four months after it was signed on the ground that the settlement terms were coerced.[4] This appeal followed a denial of the motion

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1. When plaintiff filed for divorce, she also obtained an ex parte restraining order to prevent her estranged husband from coming within 100 yards of herself or the children. The defendant had a history of violence. Plaintiff never served the order on defendant. Defendant shortly thereafter started his own divorce proceedings in Burbank. *Brockman,* 194 Cal. App. 3d at 1039, 240 Cal. Rptr. at 97.

2. *Id.* at 1040, 240 Cal. Rptr. at 97.

3. *Id.*

4. *Id.* The final judgment was entered eight months after the courthouse agreement. Plaintiff objected to provisions which were not agreed upon and defendant did not op-

to vacate.

The court of appeal held that while the general rule is that the denial of a motion to vacate is not an appealable order,[5] an exception exists when there is no effective appeal from the judgment. If the complained of error occurs at the time the judgment is entered or afterward, the record will not reveal the grounds for appeal. Thus, a motion to vacate is the only way to bring the court's attention to the issue or make a record for appeal. Under such circumstances the denial of the motion to vacate becomes appealable.

The court agreed with plaintiff that the exception was applicable since there was no record of duress when the judgment was entered and it was only via the motion to vacate that the issues of duress and coercion could be raised.

The court disagreed with defendant's contention that an appeal could not be taken from a consent judgment. If duress or coercion influenced the terms of the settlement then the plaintiff's requisite free will was absent rendering the "consent" void.

The defendant also contended that plaintiff's appeal was barred because of the delay in bringing the motion and in the intervening months she accepted the benefits of the judgment.[6]

In rejecting the defendant's argument the court relied on *In re Marriage of Fonstein*.[7] The California Supreme Court case held that mere acceptance of benefit does not bar appeal if the apellant would still be entitled to them in the event of a reversal. The court of appeal stated that it was inconceivable in this case that the benefits accepted by the plaintiff ($10,000, a Camero car, and modest support) would be reduced on remand.[8]

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pose the plaintiff's changes. Four months after the judgment was entered, the plaintiff, having changed counsel, moved to vacate the judgment in its entirety. *Id.*

5. If an original judgment is appealable, allowing an appeal for a motion to vacate results in two appeals from the same decision. Also, the possibility of an unfair extension of the period in which one may file an appeal would occur if no timely appeal has been made. *Brockman*, 194 Cal. App. 3d at 1040, 240 Cal. Rptr. at 97.

6. *Id.* at 1044, 240 Cal. Rptr. at 99.

7. *Id.* at 1044, 240 Cal. Rptr. at 99 (citing *Fonstein*, 17 Cal. 3d 738, 552 P.2d 1169, 131 Cal. Rptr. 873 (1976)).

8. *Id.* at 1045, 240 Cal. Rptr. at 100. The court had previously disposed of the parties' attempt to bind by contract their custody agreement. The court held that the best

Having established the plaintiff's right to appeal the court concluded that the trial court was in error when it failed to decide on the merits: whether plaintiff's consent to the settlement was coerced. The trial court erroneously relied on *In re Marriage of Stevenot*[9] for the proposition that once a settlement agreement is incorporated into a judgment, only extrinsic fraud may set it aside.

The court of appeal stated that while *Stevenot* represented an attempt to distinguish between intrinsic and extrinsic fraud the case itself recognizes that while duress is neither extrinsic nor intrinsic fraud it is a sufficient ground to set aside a judgment. Therefore, the court remanded the case to the trial court to determine if the plaintiff's consent was coerced.

*Michele M. Feher**

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interests of the child always come first and, therefore, any agreements between parents that attempt to divest the court of jurisdiction over minor children are void as against public policy. *Id.* at 1041, 240 Cal. Rptr. at 98.

9. The court quoted *Stevenot*, 154 Cal. App. 3d 1051, 202 Cal. Rptr. 116 (1984), at length to distinguish between intrinsic and extrinsic fraud:

> The primary architect of California's laws on the extrinsic-intrinsic fraud issue in family law cases has been one of its judicial superstars, Justice Roger Traynor. Over 40 years ago, Justice Traynor wrote, "The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic [citations]. Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court [citations]. If an unsuccessful party to an action has been kept in ignorance thereof [citations] or has been prevented from fully participating therein [citations], there has been no true adversary proceeding, and the judgment is open to attack at any time. A party who has been given proper notice of an action, however, and who has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. [Citations]. Fraud perpetrated under such circumstances is intrinsic. . . . ."

Brockman, 194 Cal. App. 3d at 1046, 240 Cal. Rptr. at 101 (quoting *Stevenot*, 154 Cal. App. 3d 1061, 202 Cal. Rptr. 123).

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2. *Failure of a business is an insufficient ground for modification of child and spousal support awards.*

In re Marriage of Norvall, 192 Cal. App. 3d 1047, 237 Cal. Rptr. 770 (5th Dist. 1987). In *In re Marriage of Norvall*, the court of appeal held that the failure of a former husband's business did not fall under any of the "exceptional circumstances" requirements of the Agnos Child Support Standards Act.[1] Therefore, a business failure was an insufficient ground for modification of child and spousal support awards.

The trial court granted the husband's petition for modification of child and spousal support based on economic hardship. Reviewing the wife's appeal, the court discussed the issue of whether the award was properly modified.

The plaintiff, Nancy Norvall, and defendant, Robert Norvall, were divorced on October 29, 1984. In their settlement agreement, custody of the two minor children would be shared. In addition, the husband agreed to pay $350 per month per child in support. He also agreed to pay Nancy $1,900 per month in spousal support. In the agreement, Robert received The Country Gourmet Restaurant business subject to all its debts. After the orders were entered, the restaurant failed, resulting in large debts for the husband and his current wife. The defendant then filed an order to show cause for modification of child and spousal support. The trial court granted his request for modification. It cited as grounds for modification the defendant's economic hardship and the fact that the children were with their father forty-four percent of the time. The trial court ordered the defendant to pay $219.52 per month per child in child support, and $1,056 per month in spousal support.

The court of appeal stated that the legislative intent of the Agnos Act was to provide a "single standard to promote equitable, adequate child support awards." In the recognition of the potential impact this would have on child support awards, the legislature passed California Civil Code section 4730 which permits the automatic review of all child support awards ordered

1. CAL. CIV. CODE §§4720-4732 (West Supp. 1988).

prior to July 1, 1985, the effective date of the act.[2] Since the original support order fell within the parameters of section 4730, it created an automatic basis for review.

Under the Agnos Act, a mandatory minimum child support is determined by a standard formula.[3] The calculated amount of support is dependant on the supporting spouse's net disposable income.[4] The court may also deduct certain unusual amounts from gross income to determine net income in cases of "extreme financial hardship."[5] These circumstances under section 4725 include examples of extraordinary health expenses, catastrophic losses, and minimum basic living expenses of either parent's dependant minor children from other marriages or relationships.[6]

In modifying the child support award, the trial court deducted $977 per month of husband's net disposable income, the amount he used directly in relation to his failed business. The appellate court determined that this money was wrongfully deducted because these payments did not fall under either the category of "exceptional circumstance" or "catastrophic losses." The court said that the wording and legislative history of section 4725 suggests business losses cannot be classified as a type of extreme financial hardship, and therefore, qualify as a deduction under section 4725.[7]

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2. CAL. CIV. CODE §4730 (West Supp. 1988).

3. CAL. CIV. CODE §4722 (West Supp. 1988). The standard formula provided in section 4722 consists of multiplying the combined net monthly income of both parents by a designated percentage factor based on the number of children. The amount each parent contributes to the mandatory minimum award is determined by multiplying the minimum award by the proportionate share of the parents' contribution to their combined net disposable income.

4. CAL. CIV. CODE §4721 (West Supp. 1988). Section 4721(c) provides that the annual net disposable income of each parent shall be computed by deducting from each parent's annual gross income actual amounts attributable to only the following: state and federal income tax, deductions attributed to the employee's contribution or self-employed worker's contribution pursuant to the Federal Insurance Contribution Act (FICA), deductions for mandatory union dues and retirement benefits, provided that they are required as a condition of employment, deductions for health insurance premiums and state disability insurance premiums, and any child or spousal support actually being paid by the parent pursuant to a court order, to or for the benefit of any person who is not a subject of the award to be established by the court.

5. CAL. CIV. CODE §4725 (West Supp. 1988).

6. CAL. CIV. CODE §4725(a)-(b) (West Supp. 1988).

7. *In re* Marriage of Norvall, 192 Cal. App. 3d 1047, 1055, 237 Cal. Rptr. 770, 775 (1987).

The appellate court determined that the trial court also erred by basing its deductions from the awarded amount of support on the amount of time the children spent with the husband under shared physical custody. The trial court multiplied the full amount of the award by forty-four percent and subtracted this figure from the full amount to determine the actual award. The court of appeal stated that the legislature did not intend for parental contributions of child support under Civil Code section 4727 to be pro rata[8] calculations which are applied mechanically.[9]

The court stated that in order to modify a spousal support order, the moving party must show a material change of circumstance since the time of the order.[10] Here, the court did not find a material change in circumstance on the part of the defendant. It determined that he was better off financially since his business failed. Furthermore, the defendant's income was increased by the contributions of his present wife's income.

Lastly, the appellate court refused to give merit to the husband's argument that pursuant to California Civil Code section 4801, the court was justified in reducing wife's award.[11] Civil Code section 4801 provides that in making an award for the dissolution of marriage, it could account for the earning capacity of the spouse. The defendant argued that plaintiff's education and career skills were justification for such modification. The court determined that this argument was invalid since the wife possessed these skills at the time of the original settlement agreement.

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8. Pro rata calculations are prepared according to a certain rate, percentage, or proportion of a given amount. BLACK'S LAW DICTIONARY 1098 (5th ed. 1979).

9. *In re* Marriage of Norvall, 192 Cal. App. 3d at 1059, 237 Cal. Rptr. at 777.

10. CAL. CIV. CODE §4727 (West Supp. 1988).

11. CAL. CIV. CODE §4801 (West Supp. 1988).

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3. *Wife is entitled to share in that part of husband's military pension which is community property.*

In re Marriage of Floweree, 195 Cal. App. 3d 1438, 241 Cal. Rptr. 307 (4th Dist. 1987). In *In re Marriage of Floweree*, the California Court of Appeal reversed the trial court's decision denying a wife's motion to divide the military pension of her former spouse as community property under California Civil Code Section 5124.[1]

Frances and Robert Floweree were married in 1957; they were divorced on November 30, 1982. Prior to the final judgment for the dissolution of marriage, they entered into a property settlement agreement which provided in part, "[N]either of us will have a claim based on any assets whether disclosed or undisclosed which are only subsequently declared to be community property by any court or legislature."[2] The settlement agreement did not discuss the disposition of Robert's military retirement benefits.

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1. California Civil Code §5124, repealed on January 1, 1986, provided in its entirety:

> (a) Community property settlements, judgments, or decrees that became final on or after June 25, 1981, and before February 1, 1983, may be modified to include a division of military retirement benefits payable on or after February 1, 1983, in a manner consistent with federal law and the law of this state as it existed before February 1, 1983.
>
> (b) Modification of community property settlements, judgments, or decrees under this section may be granted whether or not the property settlement, judgment, or decree expressly reserved the pension for further determination, omitted any reference to a military pension, or assumed in any manner implicitly or otherwise, that a pension divisible as community property before June 25, 1981, and on or after February 1, 1983, was not, as of the date the property settlement, judgment, or decree became final, divisible community property.
>
> (c) Any proceeding brought pursuant to this section shall be brought before January 1, 1986.
>
> (d) This section shall remain in effect only until January 1, 1986, and on that date is repealed unless a later enacted statute which is chaptered before that date deletes or extends that date.

(Deering 1984)

2. *In re* Marriage of Floweree, 195 Cal. App. 3d 1438, 1441, 241 Cal. Rptr. 307, 308 (1987).

On October 4, 1985, Frances filed a motion pursuant to California Civil Code section 5124 to divide Robert's military retirement benefits payable after February 1, 1983. Robert opposed her motion arguing that Frances had waived any claim to his military benefits in their settlement agreement. The trial court agreed with Robert, and denied her request. Frances appealed.

The court of appeal held that Frances did not waive her rights to Robert's military pension because the pension was always community property, and was not "subsequently declared" community property by the legislature. The court rejected Robert's argument that the United States Supreme Court decision in *McCarty v. McCarty* changed the character of his pension from community property to separate property.[3] In *McCarty*, the Court held that federal law precluded a state court from dividing military nondisability retirement benefits pursuant to community property laws.[4] The California Court of Appeal, however, held that *McCarty* was a preemption case.[5] The appellate court stated the *McCarty* holding was based on a conflict between community property principals and the federal retirement scheme.[6] Therefore, *McCarty* did not change the community property nature of Robert's military benefits, but only prevented its division under federal law.

However, in response to the widespread judicial and legislative drive to invalidate *McCarty*, Congress enacted the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA),[7] effective February 1, 1983. The FUSFSPA allows courts to treat military retirement benefits in accordance with the marital property laws of its jurisdiction. California then enacted section 5124 of the civil code to regulate and modify the disposition of judgments, decrees, or property settlements for the period between the date of *McCarty* and FUSFPSA, eradicating the effects of *McCarty*.[8]

In affirming a wife's community property rights to her for-

3. McCarty v. McCarty, 453 U.S. 210 (1981).
4. *Id.* at 223-36.
5. *In re* Marriage of Floweree, 195 Cal. App. 3d at 1442, 241 Cal. Rptr. at 309.
6. *Id*, 241 Cal. Rptr. at 309.
7. 10 U.S.C. Sections 1401-08 (1985).
8. *In re* Marriage of Floweree, 195 Cal. App. 3d at 1443, 241 Cal. Rptr. at 310.

mer husband's military retirement benefits, the California Court of Appeal upheld both federal and state legislative policy to provide for fair disposition of property acquired by either spouse during the course of a marital relationship.

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B. Reverse Paternity Suits

1. *California law recognizes the conclusive presumption that a husband cohabiting with his wife is the father of her child.*

Michael H. v. Gerald D., 191 Cal. App. 3d 995, 236 Cal. Rptr. 810 (2nd Dist. 1987). In *Michael H. v. Gerald D.*, a wife's lover brought a reverse paternity suit against her family. The California Court of Appeal affirmed the lower court's decision granting the husband's motion for summary judgment. The court determined that there was no triable issue of fact. The court asserted that the law recognizes a conclusive presumption that a husband cohabiting with his wife is the father of his wife's child.

Plaintiff, Michael H., brought this reverse paternity action against defendants, Carole D., her husband Gerald D., and Victoria D., the child. The plaintiff sought to establish himself as the biological father of Victoria D. He also wanted to establish a father/child relationship with Victoria D. The court appointed a guardian ad litem attorney[1] to represent Victoria's interests in the action. Her guardian filed a cross-complaint to establish a legal or de facto relationship with Gerald D. and/or Michael H.[2] Gerald D. moved for summary judgment on the ground there is no triable issue of fact regarding the application of California

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1. A guardian ad litem is an officer appointed by the court to represent the interests of a minor or a legally incompetent person in litigation to which she is a party. Black's Law Dictionary 635 (5th ed. 1979).

2. A de facto relationship is one which must be accepted for all practical puposes but is illegal or illegitimate. Black's Law Dictionary 397 (5th ed. 1979).

Evidence Code section 621, subdivision (a), which provides that a child born to a married woman while cohabiting with her husband, who is not impotent or sterile, is a child of that marriage.[3] The trial court granted the motion, and Michael H. and Victoria D. separately appealed.

Carole and Gerald D. were married May 9, 1976. While still married and living together as husband and wife, Carole conceived and gave birth to Victoria D. on May 11, 1981. Carole D. had an extramarital affair with Michael H. during the period she conceived Victoria. On October 29, 1981, Carole D., Michael H. and Victoria D. had blood tests done at the University of California at Los Angeles. These tests show that there is a 98.07 percent probability that Michael H. is Victoria D.'s biological father. On November 18, 1982, Michael H. filed the instant action. Carole D. and Gerald D. were still married and living together with Victoria D. at the time the action was commenced.

The court of appeal found the triable issue of fact needed to invoke the conclusive presumption of section 621[4] was not established. It stated the conclusive presumption is a codification of the social policy that, given a certain relationship between husband and wife, the husband is held responsible for the child, and the familiy unit should not be impugned.[5] In addition, the rule protects the child from the social stigma of illegitimacy.[6]

Both Victoria D. and Michael H. asserted that section 621 prevents them from establishing a biological parent-child relationship, violating their protected due process liberty interests.[7] The court weighed the competing private and state interests to determine whether section 621 protects Victoria and Michael's interests.[8] The court determined that Victoria D. and Michael

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3. CAL. EVID. CODE §621 (West 1966 & Supp. 1988)

4. A conclusive presumption is one in which proof of a basic fact makes the existence of the presumed fact conclusive and irrebutable. BLACK'S LAW DICTIONARY 263 (5th ed. 1979).

5. Michael H. v. Gerald D., 191 Cal. App. 3d 995, 1005, 236 Cal. Rptr. 810, 816 (1987) (citing Kulsior v. Silver, 54 Cal. 2d 603 at 619, 354 P.2d 657, 658, Cal. Rptr. 129, 140 (1960)).

6. *Id.* at 1005, 236 Cal. Rptr. at 816 (1987) (citing *In re* Marriage of B., 124 Cal. App. 3d 524, 529-30, 177 Cal. Rptr. 429, 432 (1981)).

7. U.S. CONST. amend. XIV, section 1 provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

8. *Michael H.*, 191 Cal. App. 3d at 1008, 236 Cal. Rptr. at 818 (1987).

H. were not denied due process. The court decided that the state interest in preserving the integrity of the matrimonial family and protecting the child's welfare by preserving established parent-child relationships is more significant than Michael's interest in establishing that he is the biological parent of Victoria D.[9]

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C. CHILD BEARING

1. *Business & Professional Code section 2063 provides a religious practice exception to the midwifery certification statutes.*

Northrup v. Superior Court, 192 Cal. App. 3d 276, 237 Cal. Rptr. 255 (3rd. Dist. 1987). In *Northrup v. Superior Court*, the petitioners, Geneva Northrup and Julia Young, were charged with violating California Business and Professions Code sections 2052, 2053 and 2505: practicing midwifery without proper certification.[1] The petitioners are members of a religious sect which

9. *Id.*

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1. CAL. BUS. & PROF. CODE § 2052 (West Supp. 1988) provides:

> Any person who practices or attempts to practice, or who advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person, without having at the time of so doing a valid, unrevoked or unsuspended certificate as provided in this chapter, or without being authorized to perform such act pursuant to a certificate obtained in accordance with some other provision of law, is guilty of a misdemeanor.

CAL. BUS. & PROF. CODE § 2053 (West Supp. 1988) provides:

> Any person who willfully, under circumstances or conditions which cause or create risk of great bodily harm, serious physical or mental illness, or death, practices or attempts to practice, or advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person,

forbids its members from obtaining medical assistance. The California Court of Appeal issued a writ of prohibition directing the superior court to dismiss the informations against the petitioners[2] and refrain from taking any further action in the cases.

The court found merit in the petitioner's contention that they were exempt from the certification requirements of Business and Professions Code, division 2, chapter 5, the Medical Practice Act. The court held that the plain, unambiguous language of section 2063 provides the petitioners with a "religious practice exemption" from the certification requirements.[3]

Additionally, the court stated that the legislative intent to give priority to its citizens religious beliefs over the state's interest in licensing medical practice was clear from the face of the statute.[4]

> without having at the time of doing so a valid, unrevoked, *and* unsuspended certificate as provided in this chapter, or without being authorized to perform *that* act pursuant to a certificate obtained in accordance with some other provision of law, is punishable by imprisonment in the county jail for not exceeding one year or in the state prison. The remedy provided in this section shall not preclude any other remedy provided by law.

CAL. BUS. & PROF. CODE § 2505 (West 1974 & Supp. 1988) authorizes and defines the practice of midwifery:

> The certificate to practice midwifery authorizes the holder to attend cases of normal childbirth. As used in this chapter, the practice of midwifery constitutes the furthering or undertaking by any person to assist a woman in normal childbirth, but it does not include the use of any instrument at any childbirth, except such instrument as is necessary in severing the umbilical cord, nor does it include the assisting of childbirth by any artifical, forcible, or mechanical means, nor the performance of any version, nor the removal of adherent placenta, nor the administering, prescribing, advising, or employing, either before or after any childbirth, of any drug, other than a disinfectant or cathartic. . . .

2. The writ petitions of Northrup and Young were consolidated on motion from the People. The court on its own consolidated the petitions for purposes of decision as well as hearing. *Northrup*, 192 Cal. App. 3d 278, n.2, 237 Cal. Rptr. 256, n.2.

3. CAL. BUS. & PROF. CODE § 2063 (West Supp. 1988).

4. The court stated that the People's reliance on Bowland v. Municipal Court, 18 Cal. 3d 479, 556 P.2d 1081, 134 Cal. Rptr. 630 (1976), was misplaced since in the instant case neither the validity of the midwifery statutes nor the state's interests in certification were being challenged. Instead, the instant case tests the scope of the "religious practice exemption" which was not addressed in *Bowland*. *Northrup*, 192 Cal. App. 3d 282, 237 Cal. Rptr. 257.

Section 2063 provides in part: "Nothing in this chapter [The Medical Practice Act] shall be construed so as to . . . regulate, prohibit, or apply to any kind of treatment by prayer, nor interfere IN ANY WAY with the practice of religion." (Emphasis in opinion).[5]

The Church of the First Born is a denomination which arrived in the United States with the Mayflower pilgrims and continues today with 150 congregations throughout the country. Its members shun the use of medical professionals and "rely on the power of God" to assist in illness. During childbirth church members use "helpers" or "attendants," who are also church members, to assist with delivery. The petitioners are acknowledged by the church as having received a "divine calling" to be helpers and are recognized as such by the church.[6]

The midwife certification requirements, which dictate the close association of midwife and medical doctor,[7] are contrary to the petitioners' religious beliefs. Helpers cannot consult physicians without violating both the helpers' and the expectant mothers' religious beliefs.

Thus, the court held that the petitioners were exempt from the certification requirements (section 2505) and could not be prosecuted under sections 2052 and 2053 when practicing as helpers attending to other church members. However, the court emphasized the narrow scope of the section 2063 "religious practice exemption," which is expressly limited to the Medical Practice Act, and stated that exemption does not protect the petitioners from possible criminal prosecution.[8]

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5. *Northrup*, 192 Cal. App. 3d 282, 237 Cal. Rptr. 259. Disciplinary action is taken against any midwife who fails to notify a physician under certain enumerated circumstances during pregnancy or childbirth. CAL. BUS. & PROF. CODE §§ 2509-2513 (West 1974 & Supp. 1988).

6. *Id.* at 279, 237 Cal. Rptr. at 257.

7. *Id.* at 281, 237 Cal. Rptr. at 258.

8. Since two of the three births, which formed the bases of the charges, resulted in still births, the court suggested that criminal sanctions may be available to the state. Although the absence of a midwifery license alone could not support a criminal prosecution, a second degree murder charge may lie if a conscious disregard for human life is demonstrated. *Northrup*, 192 Cal. App. 3d 283, 237 Cal. Rptr. 259-60 (citing *People v. Watson*, 30 Cal. 3d 290, 300, 637 P.2d 279, 289, 179 Cal. Rptr. 43, 52 (1981)).

It may be possible to prosecute on a charge of involuntary manslaughter if a lack of due care can be shown. *Id.* at 283, 237 Cal. Rptr. at 260 (citing CAL. PENAL CODE § 192

The court's suggestion that criminal sanctions may be appropriate in cases of stillbirth would seem to undermine the legislative intent of the "religious practice exemption." The state relinquishes the right to standardize the educational background of religious practitioners when it exempts them from certification requirements. Criminal prosecution of religious practitioners in the absence of intentional misconduct (which the facts do not suggest) makes the "religious practice exemption" for midwifery certification meaningless and circumvents the religious practioner's right to practice midwifery uncertified.

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III. TORT LAW

A. Fraud and Deceit

1. *Public policy prohibits actions in fraud and deceit for the misrepresentation of intent to impregnate.*

Perry v. Atkinson, 195 Cal. App. 3d 14, 240 Cal. Rptr. 402 (4th Dist. 1987). In *Perry v. Atkinson*, the court of appeal held that public policy prohibited a cause of action for fraud and deceit brought by a woman against a married man who misrepresented his intentions to provide her with the means to have a child.

Atkinson, while married to another woman, had an intimate relationship with Perry for over a year. When Perry became pregnant Atkinson urged her to have an abortion, promising that he would reimpregnate her a year later either through sexual relations or by artificial insemination.[1]

Following an abortion that she did not want, Perry learned that Atkinson never intended to keep his promise to reimpregnate her. She became depressed, required psychiatric treat-

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(West 1970 & Supp. 1988)).

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1. *Perry*, 195 Cal. App. 3d at 16, 240 Cal. Rptr. at 403.

ment, lost six months of earnings and incurred large medical expenses.[2]

Perry sued Atkinson for intentional infliction of emotional distress, fraud and deceit.[3] The trial court sustained without leave to amend Atkinson's demurrer to Perry's fraud and deceit action stating that such a cause of action would constitute an unwarranted governmental intrusion into matters affecting an individual's right to privacy and would be contra to public policy.[4]

In deciding that Perry had no cause of action for fraud and deceit the court of appeal stated that the specific conduct giving rise to such a claim must be examined. The court relied on the reasoning of *Stephen K. v. Roni L.*[5] to hold that there is no cause of action for the fradulent breach of a promise to impregnate.

In *Stephen K.*, the defendant-father in a paternity action cross-complained against the plaintiff-mother alleging that she had misrepresented her use of contraception and in reliance the defendant had sexual relations with the plaintiff which resulted in the birth of a child he did not want.

The court held that the misrepresentation was not actionable, stating "although Roni may have lied and betrayed the personal confidence reposed in her by Stephen, the circumstances and the highly intimate nature of the relationship wherein the false representations may have occurred, are such that a court should not define any standard of conduct therefor."[6]

The court further stated that to allow such a claim would

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2. *Id.*

3. During the trial of the intentional infliction of emotional distress cause of action, Perry accepted a $250,000 settlement of the case. *Id.* at 17, n.2, 240 Cal. Rptr. at 403, n.2.

4. The trial court improperly granted a summary adjudication as to the fraud and deceit cause of action in her first amended complaint. The court of appeal treated the summary adjudication order as void. The court considered Perry's appeal from the sustaining of a demurrer without leave to amend on her second amended complaint. *Id.* at 18, 240 Cal. Rptr. at 404.

5. *Perry*, 195 Cal. App. 3d 18, 240 Cal. Rptr. at 404 (citing *Stephen K.*, 105 Cal. App. 3d 640, 164 Cal. Rptr. 618 (1980)).

6. *Id.* at 18, 240 Cal. Rptr. at 404-05 (citing *Stephen K.*, 105 Cal. App. 3d 643, 164 Cal. Rptr. 620).

require "the court to supervise the promises made between two consenting adults as to circumstances of their private sexual conduct. To do so would encourage unwarranted governmental intrusion into matters affecting the individual's right to privacy."[7]

The court of appeal was also persuaded by two sections of the California Civil Code, which recognize that public policy precludes certain sexual conduct and interpersonal decisions from tort liability.[8]

No cause of action exists for alienation of affection, seduction of a person over the age of consent, or the breach of a promise to marry.[9] Additionally, causes of action for fraudulent promises to marry or cohabitate after marriage are precluded from tort liability.[10]

The court reasoned, "[i]f no cause of action can exist in tort for a fraudulent promise to fulfill the rights, duties and obligations of a marriage relationship, then logically no cause of action can exist for a fraudulent promise by a married man to impregnate a woman not his wife."[11]

The court then disposed of the cases on which Perry had relied to argue that Atkinson's right of privacy must give way to her right to protection from and compensation for physical harm and to the government's interest in protecting the health and welfare of its citizens.

In *Barbara A. v. John G.*,[12] a woman sued the man who had impregnated her for misrepresenting his infertility to her. The resulting ectopic pregnancy caused her to suffer physical and financial injuries.

The court in *Barbara A.* held that the woman could state a

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7. *Id.* at 18-19, 240 Cal. Rptr. at 405 (citing *Stephen K.*, 105 Cal. App. 3d 644-45, 164 Cal. Rptr. 620).

8. *Id.* at 19, 240 Cal. Rptr. at 405.

9. CAL. CIV. CODE § 43.5 (West 1982).

10. CAL. CIV. CODE § 43.3 (West 1982).

11. *Perry*, 195 Cal. App. 3d 19, 240 Cal. Rptr. at 405.

12. *Id.* at 19, 240 Cal. Rptr. at 405 (citing *Barbara A.*, 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983)).

cause of action for battery and deceit. The court attempted to distinguish *Stephen K.* on the ground that no child was involved and the public policy considerations regarding parental obligations were absent in the case.[13] The court of appeal disagreed that the cases were distinguishable and chose to follow the reasoning of *Stephen K.*[14]

In *Kathleen K. v. Robert B.*,[15] a woman sued a man because she contracted genital herpes from him through sexual intercourse. The court allowed an action, cited *Barbara A.*, and held that the constitutional right to privacy did not protect the defendant from liability when he failed to inform her he was infected with a veneral disease.

The court in *Perry* reasoned that *Kathleen K.* was distinguishable because "[t]he tortious transmission of a contagious disease implicates policy considerations beyond the sexual conduct and procreative decisions of two consenting adults . . . . The absence of such policy consideration here compels a different result."[16] In disallowing this type of action the court is discouraging, on public policy grounds, governmental intrustion into private sexual and reproductive decisions.

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B. Negligent Infliction of Emotional Distress

1. *Homosexual relationships fail, as a matter of law, to establish the "close relationship" requirement in actions for negligent infliction of emotional distress.*

Coon v. Joseph, 192 Cal. App. 3d 1269, 237 Cal. Rptr. 873 (4th Dist. 1987). In *Coon v. Joseph*, the court of appeal held

13. *Id.* at 19-20, n.2, 240 Cal. Rptr. at 405 (citing *Barbara A.*, 145 Cal. App. 3d 378, 193 Cal. Rptr. 429).

14. *Id.* at 20, 240 Cal. Rptr. at 406.

15. *Id.* at 20, 240 Cal. Rptr. 406, (citing *Kathleen K.*, 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984)).

16. *Id.* at 21, 240 Cal. Rptr. at 406.

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that in actions for negligent infliction of emotional distress, as a matter of law, homosexual relationships fail to establish the "close relationship" requirement under *Dillon v. Legg*.[1] The plaintiff alleged that he attempted to board a San Francisco municipal bus but was denied access. The driver allowed his life-partner, Robert Ervin, on the bus and then, in the plaintiff's presence, the driver verbally abused and struck Ervin in the face.[2]

The court split in its reasoning but was unanimous in judgment. A lengthy partial dissent was written by Presiding Justice White. Justice White disagreed that homosexual relationships failed as a matter of law to fit the *Legg* criteria.

A short concurrence by Associate Justice Barry-Deal challenged the legislature "to examine the question whether people in committed relationships, both heterosexual and homosexual, other than those meeting the legal requirements for marriage, should be accorded recognition giving rise to all, or selected, le-

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1. *Coon*, 192 Cal. App. 3d at 1272, 237 Cal. Rptr. at 874 (citing *Dillon*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968)).

2. The complaint alleged three causes of action in addition to negligent infliction of emotional distress. The court of appeal held that the plaintiff failed to state a claim of intentional infliction of emotional distress. *Coon*, 192 Cal. App. 3d at 1273, 237 Cal. Rptr. at 875.

The court relied on *Ochoa v. Superior Court*, 39 Cal. 3d 159, 703 P.2d 1216, 216 Cal. Rptr. 661 (1985). In that case, the plaintiffs (parents of the decedent) suffered extreme emotional and mental distress when they witnessed the deterioration of their son's health while he was confined in a juvenile facility. The son eventually died.

Ochoa held the tort of intentional infliction of emotional distress requires conduct that is *especially calculated to cause* the plaintiff distress. *Id.* at 165, n.5, 703 P.2d at 4, n.5, 216 Cal. Rptr. at 664, n.5.

Therefore, the court in *Coon* stated that the bus driver's actions were not especially calculated to cause distress to the plaintiff and ruled that the plaintiff's claim must fail. *Coon*, 192 Cal. App. 3d at 1273, 237 Cal. Rptr. at 875. The complainant also alleged that he had a cause of action for negligence under CAL. CIV. CODE § 2100 (West 1985) and a cause of action under CAL. CIV. CODE § 51.7 (West 1982 & Supp. 1988) for the violation of his civil rights. Section 2100 codifies the duty of commercial carriers to provide safe carriage to its passengers. Section 51.7 provides that persons should be free from violence, intimidation or threats because of race, religion, sex, or sexual orientation. The court gave short shrift to these other claims.

The court ruled that the plaintiff never became a passenger on the bus and therefore did not trigger any duty owed to him under § 2100. The court also ruled that the bus driver's threatening behavior was not directed at the plaintiff but at the plaintiff's significant other and therefore plaintiff had no cause of action under § 51.7 in his own right. *Coon*, 192 Cal. App. 3d at 1277, 237 Cal. Rptr. at 878.

gal rights traditionally reserved to married persons."[3]

In *Dillon v. Legg*, the California Supreme Court held that a mother who saw her child run down and killed had a cause of action although she herself was in a completely safe position at the time.[4] The court ruled that a defendant owed a reasonably forseeable bystander a duty of care. Courts were to use three factors to determine forseeability:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance from it. (2) Whether the shock resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with the absence of any relationship or the presence of only a distant relationship.[5]

The majority in *Coon* held *that as a matter of law* homosexual relationships do not meet the third criteria. The court stated that "the inclusion of an intimate homosexual relationship with the 'close relationship' standard would render ambivalent and weaken the necessary limits on a tortfeasor's liability mandated by *Dillon*."[6]

The court stated that the social policy to limit recovery to husband-wife, parent-child, or grandchild-grandparent relationships has been observed by California courts of appeal with two recent exceptions. The first exception, *Krivenstov v. San Rafael Taxicabs,* allowed recovery for an uncle-nephew relationship after considering the closeness of the relationship between the two.[7] The second case, *Ledger v. Tippitt,* allowed recovery to an unmarried female who observed the murder of her cohabitant,

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3. *Id.* at 1278, 237 Cal. Rptr. at 878.

4. *Id.* at 1274, 237 Cal. Rptr. at 875 (citing *Dillon,* 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968)).

5. *Id.* at 1274, 237 Cal. Rptr. at 875-76 (citing *Dillon,* 68 Cal. 2d 740, 441 P.2d 920, 69 Cal. Rptr. 80).

6. *Id.* at 1275, 237 Cal. Rptr. at 877.

7. *Id.* at 1275, n.1, 237 Cal. Rptr. at 877, n.1., (citing *Krivenstov,* 186 Cal. App. 3d 1445, 229 Cal. Rptr. 768 (1986)).

the father of her child.[8]

The court only footnoted to *Krivenstov,* and stated that it found *Ledger* inapposite because a "de facto" marital relationship could never be made in the case of homosexuals who are not allowed to legally marry.[9]

The partial dissent by Justice White takes issue with the majority's holding that homosexual relationships do not qualify as a matter of law under the *Dillon* criteria. Justice White argued that it was important to remember that the criteria was developed to help the court determine who the forseeable plaintiff was.

In *Ochoa v. Superior Court,*[10] the California Supreme Court stated:

> It is important to remember that the factors set forth in *Dillon,* were merely guidelines to be used in assessing whether the plaintiff was a forseeable victim of the defendant's negligence. As we stated in *Dillon*: "We are not now called upon to decide whether, in the absence or reduced weight of some of the above factors, we would conclude that the accident and injury were not reasonably forseeable and that therefore defendant owed no duty of care to plaintiff. In future cases the courts will draw the lines of demarcation upon facts more subtle than the compelling ones alleged in the complaint before us."[11]

White states that criteria exists to assist courts in determining whether a relationship is close enough (rendering the plaintiff reasonably forseeable) to allow recovery for the negligent infliction of emotional distress when a plaintiff witnesses a

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8. *Id.* at 1276, 237 Cal. Rptr. at 877 (citing *Ledger,* 164 Cal. App. 3d 625, 210 Cal. Rptr. 814 (1985)).

9. *Id.* at 1277, 237 Cal. Rptr. at 877. Under CAL. CIV. CODE § 4100 (West 1983), homosexuals cannot legally marry. The statute requires the proposed marital partners to be a man and a woman. This statute has not prevented many private ceremonies celebrating homosexual unions.

10. *Coon,* 192 Cal. App. 3d at 1280, 237 Cal. Rptr. at 880 (citing *Ochoa,* 39 Cal. 3d 159, 703 P.2d 1216, 216 Cal. Rptr. 661 (1985)).

11. *Id.* at 1280, 237 Cal. Rptr. at 880 (citing *Ochoa,* 39 Cal. 3d 170, 703 P.2d at 8, 216 Cal. Rptr. at 668).

particular person injured.[12]

In the instant case White stated, "In a contemporary society (and particularly in San Francisco) it is forseeable a homosexual relationship might exist. Such a relationship may be significant enough to meet the third *Dillon* requirement."[13]

Additionally, White disagrees with the majority's assertion that marriage is a requirement of recovery. Citing *Ledger,* in which recovery was granted to an unmarried woman, White states that once marriage is found not to be a requirement, "there is no reason to distinguish between heterosexual relationships and homosexual relationships in determining whether the relationship is significant and stable."[14]

White also disagreed with the majority's argument that the extension of liability beyond parent-child and husband-wife relationships would result in "unlimited liability" in the absence of rigidly adhered to rules.[15] In response to that argument White quotes *Ochos*:

> We should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless action. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which we do not share, in the capacity of legal tribunals to get at the truth in this class of claim.[16]

While the dissent disagreed with the majority's reasoning it agreed with the judgment. White states that the tort of negligent infliction of emotional distress "will not lie for bad manners or trivialities, but tortious conduct resulting in substantial invasions of clearly protected rights. . . . Recovery for this tort was not meant to cover every situation in which an individual acts

12. *Id.* at 1283-84, 237 Cal. Rptr. 883.
13. *Id.* at 1284, 237 Cal. Rptr. at 883.
14. *Id.* at 1283, 237 Cal. Rptr. at 883.
15. *Id.* at 1274, 237 Cal. Rptr. at 876.
16. *Id.* at 1280-81, 237 Cal. Rptr. at 880 (citing *Ochoa*, 39 Cal. 3d 171, 703 P.2d 1216, 216 Cal. Rptr. 669).

improperly. . . ."[17]

While Justice White has written a sensitive and forceful homosexual rights opinion, it is often difficult for a nonmember of a despised, oppressed class to appreciate the magnitude of the humiliation and emotional injury that results from blind bigotry. Each day homosexuals are verbally assailed and brutally assaulted solely because they are homosexual. Had this case involved a racial situation in which a heterosexual woman watched as a bus driver hurled racial epitaths at and struck her mate in the face, the conduct may not have been so quickly characterized as "bad manners or trivialities."

The homophobic bias of the majority opinion is apparent in its general lack of respect for the plaintiff and his life-partner. The judge refers to plaintiff's life-partner by his surname only, while affording the assaulting bus driver the common courtesy of using his full name. The dissent refers to Robert Ervin by his full name.

Additionally, the majority opinion never respects the legitimacy of the relationship between the two men. The judge refers to Ervin as the "male friend" of the plaintiff, while the dissent refers to Ervin as the plaintiff's "significant other".

The legislature's and judiciary's illegitimation of homosexual relationships is a key method used to deprive homosexuals of their rights. The majority found *Ledger* inapposite because homosexuals could never have a marital relationship, even a "de facto" one. To prevent homosexuals from legally marrying and then deny them rights and benefits because they are not married is patently absurd.

Heterosexuals have the option to marry and fall within the majority's criteria for standing to bring an action for negligent infliction of emotional distress. To disallow every homosexual relationship standing regardless of its significance and duration is

17. *Id.* at 1274, 237 Cal. Rptr. at 883.

homophobia at its height. The law should not be used to perpetuate bigotry and injustice.

*Michele M. Feher**

C. Economic Damages

1. *Plaintiff, whose daughter died in childbirth, denied economic damages sustained by quitting her job to care for daughter's children.*

St. Francis Medical Center v. Superior Court, 194 Cal. App. 3d. 668, 239 Cal. Rptr. 765 (1987). In *St. Francis Medical Center v. Superior Court*, the court of appeal held that a plaintiff, whose daughter had died in childbirth, could not recover economic damages she sustained by quitting her job to care for her daughter's children. The court reasoned that the defendants owed no duty of care to the plaintiff, and that because plaintiff's grandchildren had a statutory cause of action for wrongful death, any award of damages to plaintiff would result in a windfall to her.

Cynthia Patterson died while giving birth to her third child at St. Francis Medical Center. Her mother, Ruth Patterson, became guardian ad litem for Cynthia's three minor children and quit her job to care for the children.

Ruth Patterson and her three grandchildren brought a wrongful death action against the hospital and two doctors. The hospital then filed a motion for summary judgment, on the ground that Ruth Patterson could not maintain such an action because she was not one of the persons authorized by Code of Civil Procedure section 377.[1] Plaintiff was allowed to amend her

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1. Cal. Civ. Proc. Code § 377 (West 1973 & Supp. 1988) provides that the heirs of one whose death was caused by negligence may bring an action for wrongful death against the wrongdoer. The heirs include those who would be entitled to succeed to the decedent's property, and children, spouses, stepchildren, putative spouses, children of putative spouses, and parents who were dependents.

complaint. In the amended complaint, plaintiff separated her cause of action from those of the children and changed her cause of action to negligence. Patterson claimed that defendants should have reasonably foreseen that by negligently causing the death of her daughter, Ms. Patterson would become responsible for the care of her grandchildren and would thereby suffer economic damages.

St. Francis demurred to the negligence cause of action, and the doctors moved for a judgment on the pleadings. The superior court overruled the demurrer and denied the motion for judgment on the pleadings. Defendants then appealed.

In making its decision, the court of appeal examined the policy against double recovery and the issue of whether defendant owed plaintiff a duty of care. The existence of a duty of care to another is a question of law.[2] The court stated that plaintiff's claim was derived from defendant's negligent treatment of her daughter, not from direct negligent behavior towards plaintiff. Therefore, plaintiff could recover only if she were a third party to whom defendants' duty of care extended. A duty of care includes third parties only in limited situations. A third party may bring an action for wrongful death under Code of Civil Procedure section 377, for which plaintiff did not qualify.[3] A third party may also bring an action where she is a witness to the negligent conduct and thereby suffers emotional distress.[4] Patterson did not witness her daughter's death.

The court analogized the instant case to *Martinez v. County of Los Angeles*,[5] in which parents of a minor child who had suffered neurological damage at birth brought suit against a health care provider under a negligence cause of action. The parents claimed damages incurred by restructuring their lives to care for their disabled child. The court of appeal approved the denial of recovery to the parents, reasoning that any award of damages to

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2. *Id.*

3. St. Francis Medical Center v. Superior Court, 194 Cal. App. 3d 668, 670, 239 Cal. Rptr. 765, 767.

4. *St. Francis*, 194 Cal. App. 3d at 672, 239 Cal. Rptr. at 768, relying upon Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

5. *St. Francis*, 194 Cal. App. 3d at 672, 239 Cal. Rptr at 768, citing *Martinez*, 186 Cal. App. 3d 884, 231 Cal. Rptr. 96 (1986).

the parents would result in a windfall, as their minor child could also recover for the cost of nursing and other care.[6]

In *St. Francis*, the court relied on this same line of reasoning. Because the minor grandchildren could seek damages for their care and support, and Ms. Patterson might then seek reimbursement, plaintiff should not be able to recover economic damages herself, because the minor grandchildren could recover these damages as the expenses for their care and support. Any award of damages to Patterson would result in double recovery.

By focusing primarily on the possibility of double recovery to deny Patterson damages, the court obscured the underlying rationale of the case; the chain of causation cannot extend endlessly. Some of the damages both Patterson and the children sought were identical, such as those expenses incurred for care of the children. However, the damages resulting from Patterson's termination of her employment were not recoverable by the children. Therefore, an award of damages for lost earnings to Ms. Patterson would not result in double recovery. The court's denial of recovery for lost earnings must then be based entirely on the notion that legal causation must end somewhere, and that, in the instant case, it ends with Ms. Patterson.

*Amy C. Hirschkron**

IV. EMPLOYMENT LAW

A. Sexual Harassment

1. *Plaintiff, claiming ongoing mental and emotional injuries in suit for sexual harassment and intentional infliction of extreme emotional distress, compelled to undergo mental examination without attorney present;*

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6. *St. Francis*, 194 Cal. App. 3d at 673, 239 Cal. Rptr at 768, citing *Martinez*, 186 Cal. App. 3d at 894, 231 Cal. Rptr. at 104.

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scope of examination excluded inquiry into plaintiff's sexual history.

Vinson v. Superior Court, 43 Cal. 3d 833, 740 P.2d 404, 239 Cal. Rptr. 292 (1987). In *Vinson v. Superior Court* the California Supreme Court held that in a suit for sexual harassment and intentional infliction of extreme emotional distress in which the plaintiff claimed ongoing mental and emotional injuries, the opposing party could compel plaintiff to undergo a mental examination. The court also held that the scope of the exam excluded inquiry into plaintiff's sexual history and habits, and that the plaintiff did not have an absolute right to have her attorney present at the exam.

Plaintiff applied for a job in 1979 with a federally funded program in Oakland. Co-defendant Grant, the director of the program, made sexual advances towards her during her interview. Plaintiff declined his advances. Unbeknownst to Grant, plaintiff was later hired by the program. She claimed that when Grant realized she was employed there, he transferred her into a position for which he knew she had no training. Soon afterwards he terminated her employment.

Plaintiff brought a suit for sexual harassment and intentional infliction of emotional distress. She claimed that defendant's actions had caused her to suffer from various ongoing mental and emotional injuries. Defendant moved for an order compelling plaintiff to undergo a mental examination to determine the true extent of her injuries. Plaintiff opposed the motion claiming it violated her right to privacy. Plaintiff requested that if the court allowed the examination it should issue a protective order prohibiting the examiner from probing into her sexual history, habits or practices. She also requested that her attorney be present at the examination to assure compliance with the order. The trial court ordered plaintiff to undergo an examination and denied her motion for a protective order.

In order to delineate the parameters of discovery available to defendants in such sexual harassment suits, the California Supreme Court weighed the conflicting interests of the parties. The court stated that the interest of women who are plaintiffs in sexual harassment suits is best served by discovery procedures which protect their privacy, reasoning that women who have

been victims of sexual harassment may be deterred from bringing suit for fear that their sexual privacy will be further infringed in the process.[1] The court also stated that defendants in these suits have an interest in discovering as broad a range of relevant facts as possible. The court must fashion discovery to protect both of these interests.[2]

In *Vinson*, the California Supreme Court held that Vinson's mental state was "in controversy" for the purposes of California Civil Procedure Code section 2032. The section requires that a party's mental state be "in controversy" for a mental examination to be ordered by the opposing party.[3] The court cited *Schlagenhauf v. Holder*,[4] in which the United States Supreme Court held that under Federal Rule of Civil Procedure rule 35(a) the unsubstantiated allegations of one party as to the mental state of another party does not put that party's mental state "in controversy". California Civil Procedure Code section 2032 is modeled on the federal rule. The California Supreme Court reasoned that by alleging ongoing specific mental injuries in her pleadings, Vinson had put her mental state "in controversy" and could be compelled to undergo a mental examination.

Defendants urged the court to find that Vinson had waived her right to privacy by bringing this action. Therefore, she could be subjected to a mental examination with an unlimited scope. However, the court held that under California Civil Procedure Code sections 2036.1 and 2017 there could be no inquiry into Ms. Vinson's sexual history or habits. The court explained that the statutes prohibit inquiry into the sexual habits of sexual harassment plaintiffs, absent a showing of "good cause" by the defendant.[5]

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1. *Vinson v. Superior Court*, 43 Cal. 3d 833, 846, 740 P.2d 404, 413, 239 Cal. Rptr. 292, 302 (1987), citing Comment, *Psychiatric Examinations of Sexual Assault Victims; A Reevaluation*, 15 U.C. DAVIS L. REV. 973 (1982).

2. *Vinson*, 43 Cal. 3d at 842, 740 P.2d at 411, 239 Cal. Rptr. at 299.

3. CAL. CIV. PROC. CODE § 2032 (West 1983 & Supp. 1988).

4. *Vinson*, 43 Cal. 3d at 839, 740 P.2d at 408, 239 Cal. Rptr. at 296, citing *Schlagenhauf v. Holder*, 379 U.S. 104 (1964).

5. *Id.* at 843, 740 P.2d at 411, 239 Cal. Rptr. at 299, citing CAL. CIV. PROC. CODE § 2036.1 (Deering Supp. 1988), operative until July 1, 1987, and its replacement, CAL. CIV. PROC. CODE § 2017 (Deering Supp. 1988), which provides that in a civil suit where conduct constituting sexual harassment, sexual assault, or sexual battery is alleged, a party seeking discovery concerning plaintiff's sexual conduct with individuals other than the alleged perpetrator must establish specific facts showing good cause for that discovery.

The court stated that through its enactment of these code sections, the legislature evinced a clear public policy of encouraging sexual harassment victims to bring suit.[6] The extent to which the defense may probe into a plaintiff's sexual relations with people other than the defendant is limited. Thus, the court reasoned, plaintiff's sexual privacy is infringed upon only to the extent necessary for fair resolution of the disputed facts of the case.[7] The court allowed defendants to compel a mental exam with limited scope.

The court then examined plaintiff's asserted right to have her attorney present during the exam. Characterizing the mental examination as a hostile setting, Vinson argued that her attorney should be present to protect her from improper questioning and the potential of inaccurate reporting of her statements. The court held that Vinson was not entitled to have her attorney present.

The court cited *Edwards v. Superior Court*,[8] in which the court held a plaintiff claiming emotional injuries as a result of a defendant school district's negligence could not have her attorney present at her mental examination. In that case, the California Supreme Court held that the plaintiff could not insist on the presence of counsel at her mental examination. Referring to their holding in *Edwards*,[9] The court stated in the instant case that "[w]hatever comfort her attorney's handholding might afford was substantially outweighed by the distraction and potential disruption caused by the presence of a third person."[10] Fur-

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6. *Vinson*, 43 Cal. 3d at 843, 740 P.2d at 411, 239 Cal. Rptr. at 299, quoting 1985 Cal. Stat. 1328, § 1, in which the legislature stated:

> The discovery of sexual aspects of complainant's (sic) lives, as well as those of their past and current friends and acquaintances, has the clear potential to discourage complaints and to annoy and harass litigants. . . Without protection against it, individuals whose intimate lives are unjustifiably and offensively intruded upon might face the "Catch-22" of invoking their remedy only at the risk of enduring further intrusions into details of their personal lives in discovery . . . .

7. *Vinson*, 43 Cal. 3d at 842, 740 P.2d at 410, 239 Cal. Rptr. at 298, citing Britt v. Superior Court, 20 Cal. 3d 844, 858, 859, 574 P.2d 766, 775, 143 Cal. Rptr. 695, 704 (1974).

8. *Id.* at 844, 740 P.2d at 412, 239 Cal. Rptr. at 300, citing Edwards v. Superior Court, 16 Cal. 3d 905, 549 P.2d 846, 130 Cal. Rptr. 14 (1976).

9. *Edwards*, 16 Cal. 3d 905, 549 P.2d 846, 130 Cal. Rptr. 14.

10. *Vinson*, 43 Cal. 3d at 845, 740 P.2d at 412, 239 Cal. Rptr. at 300.

ther, the court reasoned that an attorney, unfamiliar with psychiatry, would be unlikely to understand the relevance of the questioning. The court declined to reconsider *Edwards*, despite Justice Sullivan's dissent, joined by Justice Mosk.[11] The dissent argued that the attorney's presence should be permitted because of the adversarial nature of the proceeding. "[F]urthermore, the ordeal of submitting oneself to the probing inquiries of someone whom the examinee may, as in the instant case, view as a hostile medical force, is not to be taken lightly."[12]

While the court attempted to shape sexual harassment discovery to protect both parties' interests, they failed to take public policy into account when considering the right of plaintiffs to have counsel present at mental examinations. The legislature has considered the very real potential for invasion into the privacy and further harassment of sexual harassment litigants. However, the court viewed plaintiff's request for her attorney's presence as unnecessary "handholding". The court refused to distinguish a sexual harassment plaintiff from a plaintiff in a simple negligence case. The court cited cases from other jurisdictions which have held that sexual harassment plaintiffs are entitled to have an attorney or a psychiatrist present at a mental examination.[13] Yet the court failed to recognize that these approaches more actively promote the stated policy of protecting the privacy of sexual harassment plaintiffs. The court should have examined the special circumstance of the sexual harassment plaintiff more vigorously, and perhaps considered the alternative of allowing her to have a psychiatrist observe the exam.

*Amy C. Hirschkron**

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11. Edwards v. Superior Court, 16 Cal. 3d 905, 915, 549 P.2d 846, 852, 130 Cal. Rptr. 14, 20 (Sullivan, J., dissenting, joined by Mosk, J.).

12. *Id.* at 845, 740 P.2d at 412, 239 Cal. Rptr. at 300, quoting *Edwards*, 16 Cal. 3d at 915, 549 P.2d at 852, 130 Cal. Rptr. at 20.

13. *Vinson*, 43 Cal. 3d at 845, 740 P.2d at 412, 239 Cal. Rptr. at 301, citing Zabkowicz v. West Bend Co., 585 F. Supp. 635 (E.D. Wis. 1984) (plaintiff in sexual harassment suit was permitted to have attorney or recording device present at mental exam); Lowe v. Philadelphia, 101 F.R.D. 296 (E.D. Pa. 1983) (plaintiff in sexual harassment suit permitted to have psychiatrist or medical expert observe mental exam).

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